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Attorney and Client--Misdemeanor of Withholding Client's Funds--Disbarment

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an indefinite rule, based on varying facts and circumstances, which would impair the certainty and security of land titles.[12]

Finally, social interest in family relations dictates a strict adherence to the statute. One of the essential purposes of adoption laws is the protection of the child's welfare in securing a proper home, suitable environment, and responsible parents.[13] It is submitted that equity, especially, has been too free to exercise a dispensing power in the teeth of an express statute such as the Statute of Frauds.[14] It is submitted that the decision in the principal case is sound.

—CHARLES W. CALDWELL.

ATTORNEY AND CLIENT — MISDEMEANOR OF WITHHOLDING CLIENT'S FUNDS — DISBARMENT. — In a civil action by notice of motion to recover money wrongfully withheld by an attorney, a verdict was returned for the plaintiff. The trial court upon its own motion ordered and adjudged that the defendant be deemed guilty of a misdemeanor and fined, and further ordered that the defendant be disbarred, to which the defendant brings error.

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[12] See Carroll's Estate, 219 Pa. 440, 446, 68 Atl. 1038 (1908), where it was said: "The personal attitude of the inmates of a family towards an adopted child, as regards the family relation, is a matter entirely for the parties. But the matter of inheritance is entirely under the regulation of the law. The right to take property by devise or descent is the creation of the law, and not a natural right."

[13] The West Virginia statute, W. VA. REV. CODE (1931), c. 48, art. 4, §§ 1-6, provides that it shall be necessary that a discreet and suitable person be appointed to act as next friend of the child sought to be adopted, and that he shall satisfy the court that the child's welfare would be promoted by the adoption.

Apparently no case has come before the West Virginia Supreme Court of Appeals, but the court has referred to the statute. In Riley v. Riley, 38 W. Va. 283, 287, 18 S. E. 569 (1893), there was an action for work and labor by a nephew who has made his home with an uncle but never legally adopted, and the court said: "he could have adopted his nephew, in which case he (nephew) . . . . would have been invested with every legal right, privilege, obligation and relation in respect to education, maintenance and the right of inheritance in the estate of the adopting parent . . . ." See also Burdette v. Insurance Co., 80 W. Va. 384, 93 S. E. 366 (1917).

[14] In most of the states the adoption laws apply only to a child or minor but in some the adoption of adults is provided for, as for instance in New York, N. Y. DOM. REL. LAW, art. 7, § 110. It is suggested that such provisions are inimical to the public interest. The West Virginia statute refers only to minors, however, it might be advisable to make an exception in behalf of a person taken into the family when a child and continuously a member of the household but never legally adopted. This sort of a provision would eliminate many of the hardship cases.

Held: The judgment fining the attorney without conviction on indictment and disbarring him was error. The court disavowed any design to limit the power of the circuit court, in a proper case, to strike an attorney's name from the roll, but decided that since the disbarment was so interwoven by statutory mandate with the trial courts judgment it too must be set aside. *Hall v. Eary.*[1]

The misdemeanor referred to[2] and the portion of the statute under which the trial court judge acted, is criminal in nature, punishable by indictment, and an action thereunder is barred by the one year statute of limitations for misdemeanors.[3] Similarly to criminal contempt proceedings, the offense charged cannot be tried on the civil side of the court.[4] The accused in such an action is protected by the constitutional privilege against self-incrimination,[5] and is presumed to be innocent until proven guilty beyond a reasonable doubt.[6]

The disbarment proceeding is said to be civil in its nature,[7] or by some courts neither civil nor criminal but a proceeding *sui generis*.[8] It is, however, well established that a court may summarily and upon its own motion strike the name of an attorney from the roll,[9] and it is not necessary that such proceedings should

[1] 170 S. E. 904 (W. Va. 1933).

[2] W. VA. REV. CODE (1931) c. 30, art. 2, § 13, "and he shall be deemed guilty of a misdemeanor and be fined not less than twenty or more than five hundred dollars."

[3] State v. Locke, 73 W. Va. 713, at 717, 81 S. E. 401 (1914): "Whenever the act or series of acts necessary to constitute a criminal withholding of money collected by an attorney for his client have transpired, the crime is complete and from that day the statute of limitations begins to run."

[4] State v. Fredlock, 52 W. Va. 232, 43 S. E. 153 (1902).

[5] Gompers v. Bucks Stove and Range Co., 221 U. S. 418, at 444, 31 S. Ct. 492 (1911): For notwithstanding the many elements of similarity in procedure and in punishment [in criminal and civil contempts] there are some differences between the two classes of proceedings, which involve substantial rights and constitutional privileges; it is certain in proceedings for criminal contempt, the defendant is presumed to be innocent until proven guilty beyond a reasonable doubt, and cannot be compelled to testify against himself.

[6] U. S. v. Jose, 63 Fed. 951 (C. C. D. Wash. 1894); State v. Davis, 50 W. Va. 100, 40 S. E. 331 (1901).

[7] Keithley v. Stevens, 238 Ill. 199, 89 N. E. 375 (1909).

[8] State v. Peck, 88 Conn. 447, 91 Atl. 274 (1914). *Cf.* Lenihan v. Commonwealth, 165 Ky. 93, at 106, 176 S. W. 948 (1915): Disbarment proceedings, although classed as civil are nevertheless of a quasi criminal nature and the respondent should be allowed to introduce evidence of his good character; *In re* Spencer, 137 App. Div. 939, 122 N. Y. Supp. 190, at 194 (1910: A proceeding to disbar must for the purpose of procuring evidence be treated as a special proceeding, wherein the respondent cannot demand the right to be confronted with the witness against him.

[9] *Ex parte* Wall, 107 U. S. 265, 2 S. Ct. 569 (1882); State v. McClaugherty, 33 W. Va. 250, 10 S. E. 470 (1889).

be founded upon formal allegation,[10] provided the attorney accused has had sufficient notice and an opportunity to defend.[11] The power to disbar is not limited to cases where the attorney has been convicted of a criminal offense,[12] nor is it limited necessarily to acts of misconduct committed in a professional capacity.[13] The proceedings of disbarment is not for the purpose of punishment but rather to preserve the courts of justice from the official ministrations of persons unfit to practice in them.[14]

The wrongful withholding of a client's money is generally considered grounds for disbarment or suspension, either at common law[15] or under the statutes.[16] The courts independently of the statute may regulate the conduct of their officers and discipline according to their discretion.[17] Statutes providing for suspension and disbarment of attorneys for such unprofessional conduct are interpreted as not restricting the court's inherent power in this respect.[18] Such provisions are usually construed as nonexclusive[19]

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[10] State v. Hays, 64 W. Va. 45, at 48, 61 S. E. 355 (1908). "Formal allegations and technical description of the misconduct charged are not necessary; *In re* Lowenthal, 78 Cal. 427, 21 Pac. 7 (1889).

[11] Holms v. Conway, 241 U. S. 624, 36 S. Ct. 681 (1915); Barnes v. Lyons, 187 Fed. 881, at 883 (C. C. A. 9th, 1911) "Before an attorney at law is removed from his office by a court whether under a statute or in the exercise of its inherent powers, he is entitled to have specific charges made against him and to notice and an opportunity to be heard in defense, the usual practice being to issue a rule upon him to show cause stating the substance of the charges."

[12] Underwood v. Commonwealth, 32 Ky. L. 32, 105 S. W. 151 (1907); *In re* Radford, 168 Mich. 474, 134 N. W. 472 (1912).

[13] State v. McClaugherty, *supra* n. 9 at 258, ". . . and when an attorney commits an act, whether in the discharge of his duties as such or not, showing such a want of professional or personal honesty as renders him unworthy of public confidence, it is not only the province, but the duty of the court, to strike his name from the roll of its attorneys."

[14] *Ex parte* Wall, *supra* n. 9. *In re* Durant, 80 Conn. 140, at 147, 67 Atl. 497 (1907) The power to declare the forfeiture of an attorney's privilege to practice is a summary one inherent in the courts and exists not to mete out punishment to an offender, but that the administration of justice may be safeguarded and the courts and the public protected from the misconduct of those who are licensed to practice.

[15] People v. Storey, 265 Ill. 207, 106 N. E. 797 (1914).

[16] *In re* Maloney 35 N. D. 1, 145 N. W. 385 (1915); W. VA. REV. CODE (1931) c. 30, art. 2, § 14.

[17] State *ex rel.* Johnson v. Gebhardt, 87 Mo. App. 542 (1901), It is almost universally held that the courts have an inherent power to disbar attorneys and strike their names from the rolls independent of any statute on the subject, nor does the enumeration of statutory grounds for disbarment deprive them of power to disbar for other causes.

[18] Commonwealth v. Roe, 129 Ky. 650, at 657, 112 S. W. 683 (1908), "The court independently of statute has the right to disbar its officers if the facts of the case justify it."

[19] Lenihan v. Commonwealth, *supra* n. 8 at 591, where the statute provided that an attorney may be disbarred. The court held this to be non-exclusive

or merely declaratory of the common law.[20] Consequently it appears that the trial court in the principal case might have properly disbarred the defendant without a prior conviction of a criminal offense; but since the disbarment order was considered mandatory and predicated upon the supposed misdemeanor, the reversal as to this part of the order seems consistent with reason under the extraordinary circumstances, and in no way precludes a disbarment proceeding independent of this action.

—W. F. WUNSCHEL.

COMMON CARRIER — AEROPLANE AS COMMON CARRIER — LIMITATION OF LIABILITY. — In the District Court the plaintiff recovered a verdict against the defendant aeroplane corporation for damages suffered by her through the death of her husband, alleged to have been brought about by the negligence of the defendant. The defendant appealed to the Circuit Court of Appeals from this judgment claiming that it was not liable for damages in excess of the amount stipulated in the passenger's ticket. *Held*: Aeroplane carriers, like other common carriers, cannot limit their legal liability for negligent injury of the passengers. Judgment affirmed. *Curtiss-Wright Flying Service Inc. v. Glose.*[1]

From the very infancy of aviation, writers have anticipated the application of "common carrier" law to aeroplane transportation.[2] But, even so, it does not appear that there have been any decisions of the Supreme Court of the United States nor any Fed-

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and the absence of other statutory causes of disbarment did not prevent disbarment proceedings where the attorney was guilty of personal or professional misconduct. *Contra*: Kane v. Haywood, 66 N. C. 1 (1872). A statute has been held to restrict the powers of the judiciary as to punishment and disbarment of attorneys, where it leaves no room for construction and goes on with manifest intention to restrict. *In re* Eaton, 4 N. D. 514, 62 N. W. 597 (1895). Where a statute enumerates grounds for the disbarment of an attorney no other grounds can be considered by the court. *In re* Collins, 147 Cal. 8, 81 Pac. 220 (1905).

[20] State v. Harber, 129 Mo. 314, 31 S. W. 889 (1895).

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[1] 66 F. (2d) 710 (C. C. A. 3d, 1933).

[2] "Doubtless the rules governing the business of a common carrier by airship could be readily assimilated to most of those applied to other common carriers." Moore, *Aërial Navigation* (1900) 4 LAW NOTES 87. See also (1926) 20 ILL. L. REV. 511. A common carrier in the modern sense includes a carrier of passengers as well as one of goods. The carrier is not an insurer but is bound to exercise care and diligence for safety of passengers. Chaput v. Lussier, 165 Atl. 573 (Maine, 1933). 2 HUTCHISON, LAW OF CARRIERS (3d ed. 1906) § 963.